United States Court of Appeals

for the Second Circuit

SUPPLEMENTAL BRIEF

75-1246

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1246

UNITED STATES OF AMERICA,

Appellee,

—v.—

DONALD EUCKER,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SUPPLEMENTAL BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Donald Eucker appeals from a judgment of conviction entered on June 16, 1975, after a plea of guilty, in the United States District Court for the Southern District of New York, before the Honorable Whitman Knapp, United States District Judge, and from an order entered by that Court on April 27, 1976, denying leave to withdraw the defendant's guilty plea.

Statement of Facts

On March 14, 1975, approximately two weeks prior to his scheduled trial date, Donald Eucker entered a plea

of guilty to Count Nine of Indictment 74 Cr. 859.* In pleading guilty to that count, Eucker admitted that he was responsible for hypothecating fully-paid securities owned by customers of Orvis Brothers and, in the course of doing so, had subjected those securities to liens of over $7,000,000. On June 16, 1975, Judge Knapp sentenced Eucker to a term of imprisonment of one year and one day.

Two days prior to his guilty plea to Count Nine, Eucker had moved to dismiss that count on the ground that an element of the offense had not been alleged. Specifically, the defendant argued that in order to state an offense under Section 8(c) of the Securities Exchange Act of 1934, 15 U.S.C. § 78h, the Government was required to allege that the hypothecation of customers' securities exceeded the aggregate indebtedness of the customers

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* Count Nine of the indictment reads as follows:

1. From August 1, 1969 to June 3, 1970, Orvis Brothers & Co., was a brokerage firm, a member of the New York Securities and Exchange, and a registered broker and dealer pursuant to Section 15 of the Securities and Exchange Act of 1934, and, as such, was subject to the provisions of Rule 8c-1 (17 C.F.R. Section 240.8c-1), a rule prescribed by the S.E.C. for the protection of investors.
2. From on or about the 1st day of August, 1969 up to and including the 3rd day of June 1970, in the Southern District of New York, FERGUS M. SLOAN, JR., CARL W. ANDERSON, DONALD EUCKER, JOHN J. VILLANI, and THOMAS C. KILDUFF, the defendants, unlawfully, wilfully and knowingly, did directly and indirectly, hypothecate and arrange for and permit the continued hypothecation of fully paid for securities carried for the account of customers of Orvis under circumstances that permitted such securities to be hypothecated and subjected to liens and claims of pledges in amounts up to $7,000,000.00.

(Title 15, United States Code, Sections 78h and 78ff and 17 C.F.R. Section 240.8c-1; Title 18, United States Code, Section 2).

to the brokerage house. In making this argument, Eucker relied on subsection (3) of Section 8(c), even though the indictment did not designate that subsection in its statutory reference for Count Nine.

The Government argued, in response to Eucker's motion, that aggregate indebtedness was not an element of the offense. Judge Knapp concurred with the Government's position and denied the motion.

Eucker then entered a plea of guilty to Count Nine, reserving for appeal his argument that aggregate indebtedness was an element of the offense. An appeal was taken to this Court on that issue. This Court stated that "the Government is not required to rely upon that statutory provision which the defendant chooses to select." *United States* v. *Eucker*, Dkt. No. 75-1246, slip op. 2459, at 2471 (2d Cir., Mar. 8, 1976). However, a decision on the merits by this Court was deferred pending a remand to the District Court for a determination as to whether the defendant understood the nature of the charges to which he pleaded guilty. *Id.* at 2472.*

Pursuant to the order upon the remand, Judge Knapp, on April 18, 1976, held an evidentiary hearing at which the defendant testified in his own behalf. Based on that testimony and the entire record before it, the District

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* Dissenting from the majority's decision to remand on this issue, Judge Moore noted that "the facts in this case belie any argument that Eucker was either ignorant or confused at the time of his plea." *United States* v. *Eucker*, *supra*, slip op. at 2473. Judge Moore commented further that the effect of the remand was "to clothe Eucker with an innocence which the facts plainly refute," and that "Eucker should not be given the opportunity—at this late stage in the proceedings—to plead a state of ignorance or helpless confusion which is disingenuous and completely contrary to the record." *Id.* at 2475.

Court found that the defendant's guilty plea was knowingly made. The defendant's motion for leave to withdraw his plea of guilty was accordingly denied.

ARGUMENT

POINT I

Count Nine properly charged an offense under Section 8(c) and Eucker admitted to the offense upon his plea of guilty.

As his first point on this appeal Eucker renews his claim that Count Nine of the Indictment should be dismissed for failure to state a crime. First, focusing upon Section 8(c)(3) of the Securities Exchange Act, 15 U.S.C. § 78h(c)(3), Eucker again contends that aggregate indebtedness is an element of an offense under this subsection and that Count Nine clearly does not state a crime under this subsection, because it does not contain an allegation that the hypothecations exceeded aggregate indebtedness. The Government, of course, has never argued that Count Nine was intended to state an offense under subsection (3). Secondly, to meet the Government's argument that offenses under subsections (1) and (2) of Section 8(c), 15 U.S.C. § 78h(c)(1) and (2), were properly alleged in Count Nine, Eucker now contends that not all of the elements of those offenses were contained in the Indictment or admitted by Eucker upon his guilty plea. More specifically, Eucker argues that the Indictment does not allege the element of commingling and that Eucker did not admit this element during his plea. This argument is specious.

Eucker's position is premised on the theoretical possibility that fully-paid for customers' securities could be hypothecated without commingling by giving one indi-

vidual customer's securities to a bank to be held by itself in a single loan account. Although hypothetically commingling would be avoided under those circumstances, as a practical matter that situation simply does not arise. Any one bank commingles all securities held for the account of a particular broker and major Wall Street brokers like Orvis Brothers do not turn to a bank to borrow on the securities of a single customer. Indeed, in the case of Orvis Brothers, the smallest loan account of the firm at any one bank involved the hypothecation of $282,200 worth of securities (Government Brief at 96, n.), and Count Nine alleged hypothecations which subjected fully paid for customer securities "to liens and claims of pledges in amounts up to $7,000,000." In that circumstance, although Count Nine was not cast in the precise language of Section 8(c)(1), the charge of commingling was clearly subsumed in the Indictment's charge that Eucker had participated in the hypothecation of fully paid for securities which resulted in liens and claims of pledges up $7,000,000.

Nor can it fairly be argued that Eucker was unaware that his admission that he had participated in the hypothecation of fully-paid for customer securities resulting in $7,000,000 of liens and pledges necessarily constituted an acknowledgement that the securities had been commingled. Eucker was intimately aware of the practices and procedures of the securities industry.* Indeed,

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* Eucker worked as a Senior Accountant at Haskins & Sells for five years where he essentially audited securities brokerage firms. After joining Orvis Brothers, he was in charge of both operations and finances of that firm. (Tr. 20-21) (Aff. in Opposition to Motion to Withdraw Guilty Plea, sworn to April 14, 1976, ¶8, p. 3). The defendant's familiarity with the workings of the securities industry was properly considered by the District Court. *Kloner* v. *United States*, Dkt. No. 75-2136, slip op. 3661,

[Footnote continued on following page]

Eucker admitted, at the hearing upon remand under questioning by the Court, that he was fully aware that securities hypothecated by Orvis were necessarily commingled (Tr. 25-26).*

For these reasons and for the reasons more fully set forth in the Government's initial brief at 95-98, the hypothecation of fully paid customers' securities as charged in Count Nine constituted a violation of Section 8(c)(1) and, as this Court noted in its opinion, could well constitute a violation of Section 8(c)(2), too. In addition, Eucker's plea admitted his responsibility for offenses under either subsection (1) or (2).**

3665-6 (2d Cir., May 10, 1976); *Seiller* v. *United States*, Dkt. No. 75-2002, slip op. 6509 (2d Cir., Dec. 1, 1975); *Irizarry* v. *United States*, 508 F.2d 960, 964 n. 3 (2d Cir. 1974); *Eagle Thunder* v. *United States*, 477 F.2d 1326 (8th Cir.), *cert. denied*, 414 U.S. 873 (1973).

* The frivolousness of Eucker's argument can perhaps be more easily understood in the context of a simple armed bank robbery. Suppose a defendant were arrested under 18 U.S.C. § 2113(d) for robbing a bank by use of a "dangerous weapon," as provided in that statute. Suppose further that the indictment charged that the defendant entered the bank and confronted a teller by pointing "a pistol" in the direction of the teller. Also suppose that at the time of the defendant's plea of guilty he admitted confronting the teller with "the pistol."

If the defendant were later to seek to vacate his plea on the grounds that the indictment did not actually charge use of a "dangerous weapon," but only a "pistol" and the pistol "hypothetically" could have been a toy replica, this Court would not tarry long with the defendant's claim in the absence of some showing that the pistol used in the robbery was in fact a toy.

** Judge Knapp specifically declined to uphold Eucker's plea on the ground that an offense had been stated under the general anti-fraud provisions of the securities laws, 15 U.S.C. §§ 77q(a), 78j(b) and 78o(c), finding that the jurisdictional elements of those provisions had not been alleged in the indictment or admitted by Eucker upon his guilty plea. The Government concedes that Judge Knapp's point is well taken and, accordingly, it abandons its reliance on those provisions.

POINT II

The defendant's plea was knowingly made, and the district court's findings to that effect are not clearly erroneous.

Eucker also argues that his plea must be vacated because he did not knowingly plead guilty to a crime. On the contrary, the record before the District Court amply supports its finding that the defendant entered his guilty plea with an understanding of the nature of the charges against him as required by Rule 11 of the Federal Rules of Evidence.

To make a showing sufficient to require a withdrawal of his plea, Eucker had to demonstrate below that he pleaded guilty without an "understanding of the essential elements of the crime charged." *McCarthy* v. *United* States, 508 F.2d 960, 965 (2d Cir. 1974). Eucker did not, and we submit could not make that showing.

At the hearing held before the District Court, Eucker testified that he understood the charge of Count Nine to be that he hypothecated customers' securities in excess of aggregate indebtedness (Tr. 22). The Court immediately responded to that statement by asking Eucker: "You knew they weren't charging you with that because they specifically said they weren't charging you with that?" (Tr. 22). Eucker acknowledged that point indirectly by saying that he believed hypothecation of customers' securities, unless in excess of aggregate indebtedness, was not illegal and that he had pleaded guilty to a "non-crime."

On cross-examination, Eucker admitted that he did understand at the time of the plea that the Government's position was that it was in fact a crime to hypothecate

fully-paid customers' securities, regardless of any allegation of aggregate indebtedness (Tr. 30). Eucker further admitted that he knew that when customers' securities were hypothecated they would necessarily be commingled (Tr. 26) and that he was "not entitled to be hypothecating fully-paid customers' securities" (Tr. 31). Again, he conceded that at the time of his plea he understood that Government was charging him with the crime of hypothecating fully-paid customers' securities (Tr. 35). Based on these admissions, coupled with the defendant's background in the securities industry, the Court was surely entitled to find that the defendant's plea was made with an understanding of the charges against him.

The defendant argues in his brief to this Court that, contrary to Judge Knapp's findings, his guilty plea was non-knowing because he believed, on advice of counsel, that he was not pleading guilty to any crime at all (Appellant's Brief at 10). This argument is frivolous. As is clear from Eucker's admission on cross-examination, he fully understood that the Government disputed his attorney's contentions and maintained that the count to which he pleaded guilty did alleged a crime. He further understood that his claim that no crime was alleged would be contested on appeal and that the Court of Appeals might well find against him (Tr. 24, 30, 37-38). Thus, Eucker's showing at the hearing and his argument on appeal constitutes, at most, a claim that he pleaded guilty with the hope that, on appeal, the charges against him would be found not to constitute a crime, but with full knowledge that he had no guarantee that the appeal would be decided in his favor. The existence of such hopes cannot vitiate a guilty plea and render it non-knowing.

Although not pressed in the supplementary brief submitted to this Court, Eucker's attorney, in support of the motion before the District Court, submitted an affidavit

stating that "[n]o consideration was ever given to the applicability of any . . . statutory offense" other than the subsection relating to aggregate indebtedness (Aff. in Support of Motion, sworn to March 29, 1976, p. 2). The Government responded by pointing out that in response to Eucker's request for a bill of particulars, the Government had stated that aggregate indebtedness was "irrelevant and immaterial." Furthermore, in opposition to the motion to withdraw the guilty plea, the Government submitted to the District Court the affidavit of Kenneth R. Feinberg, who had been the Assistant United States Attorney in charge of Eucker's case at the time of the guilty plea. In that affidavit, Mr. Feinberg attested that following the exchange of papers with respect to the bill of particulars, he "reminded Mr. Arkin that he [Mr. Arkin] was pointing to only one of the statute's three [sub]sections" when he argued that aggregate indebtedness was an essential element of an offense under Section 8(c) (Aff. in Opposition to Motion, sworn to April 6, 1976, p. 2, ¶ 7). In that circumstance, defense counsel was surely on notice that the Government contended that the Indictment charged an offense under subdivisions (1) and (2), and Eucker testified that he consulted with his attorney prior to entering his plea of guilty (Tr. 20).

In summary, this is not a case where "because of ignorance or misinformation," the defendant was "misled into entering the plea" of guilty. *Kloner* v. *United States*, *supra*, slip op. at 3665. On the record before it, the District Court was well justified in finding that Eucker pleaded guilty with an understanding of the nature of the charges against him. Such findings may properly be disturbed only if clearly erroneous—a showing which Eucker has failed to make. See *United States* v. *Lombardozzi*, 436 F.2d 878 (2d Cir.), *cert. denied*, 402 U.S. 908 (1971); *United States* v. *Hughes*, 325 F.2d 789 (2d Cir. 1964).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Audrey Strauss being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 28th day of May 1976 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Stanley Arkin Esq.
300 Madison Avenue
New York New York 10017

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Audrey Strauss

Audrey Strauss

Sworn to before me this
28th day of May 1976

Olga C. Gramp

OLGA C. GRAMPP
Notary Public, State of New York
No. 24-4503888
Qualified in Richmond Cty.
Commission Expires March 30, 1977